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Nos. 80-157, 80-158, 80-170, 80-172

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBOTT LABORATORIES, *et al., Petitioners,*

v.

JUDITH SINDELL, *et al., Respondents.*

On Petition For A Writ Of Certiorari To The Supreme Court Of California

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BRIEF *AMICUS CURIAE* OF THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

RICHARD A. WHITING
LOREN KIEVE
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000
(Counsel of Record)

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, Illinois 60637

Attorneys for Amicus Curiae The American Insurance Association

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QUESTIONS PRESENTED

1. Whether the market share rule announced by the California Supreme Court is a denial of due process because it is unfair, irrational and unworkable.

2. Whether the market share rule is in conflict with the Food and Drug Act which is designed to facilitate the widespread and inexpensive distribution of generic drugs.

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BRIEF *AMICUS CURIAE* OF THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

The American Insurance Association ("AIA"), with the consent of all parties,* files this brief *amicus curiae* in support of the petitions for a writ of certiorari to review the judgment of the California Supreme Court.

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* The written consents of counsel for the parties have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

AIA is a trade association whose 150 member companies account for a substantial proportion of the product liability insurance in effect in the United States today. Many of its members have written policies for drug companies, including companies that have manufactured diethylstilbestrol ("DES"). Many hope to be able to offer insurance coverage to drug companies in the future. AIA files this brief in support of the petitions for certiorari because California's "market share" rule will, if allowed to stand, have intolerable consequences for the insurance industry, the tort system, and the nation as a whole.

One consequence of the market share rule is to make it virtually impossible for insurers to issue general commercial liability policies to drug companies. This type of policy must ontain an indemnity and a defense obligation. Under the market share rule, neither of these can be estimated with tolerable accuracy. The indemnity obligation cannot be priced because one firm will as a matter of course be held responsible for losses caused by any other firm that sells the same products. The defense obligation cannot be priced because the market share rule will create enormous and uncontrollable litigation costs merely to sort out the shares of all defendants before the substantive issues in these cases — difficult enough in their own right — are even reached.[1] The

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[1] The administrative costs implicit in this litigation are fast becoming common knowledge. *See* M. Kinsley, *Fate and Lawsuits,* New Republic, June 14, 1980, 20 at 21:

> A 1977 government study of product liability [Interagency Task Force on Product Liability, Final Report on the Insurance Study, U.S. Dep't of Commerce PB-263-600] concluded that each dollar paid to plaintiffs costs defendants another 42 cents in expenses, almost all for lawyers, and that about 35

absence of insurance will surely drive small drug manufacturers out of the market and will increase the reluctance of all drug manufacturers to introduce new and life-saving drugs. The breakdown of private insurance markets in the swine flu vaccine program is already a matter of public record.[2]

The market share rule also threatens to have an enormous *retroactive* impact upon both the pharmaceutical manufacturers and their insurers. Indeed, behind each of the actual and potential defendants in every DES case stands in uneasy harness a complex network of primary, excess and reinsurance carriers. At present, it is far from determined how the costs of defense and indemnity are to be divided between insurer and insured under the standard commercial liability policy; coverage disputes between them have increased

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> cents of the plaintiff's dollar goes to lawyers too. This means that on the average it takes 77 cents in legal costs to deliver 65 cents to the victim, not even counting the cost to the government of running the show or the time contributed by people drafted for jury duty. . . . And like a traveling road show, the same lawyers and the same hired experts will litigate the same issues at equivalent cost dozens, or even hundreds, of times around the country before the DES saga is over. The victims will get thousands; the lawyers will get millions.

Of course, neither the Interagency Task Force Study nor the most recent systematic analysis of the substantial costs of product liability claims — the Insurance Services Office, Product Liability Closed Claim Survey: A Technical Analysis of Survey Results (1977) — reflects the vastly increased costs imposed by the adoption of the market share rule in 1980.

[2] *See* Swine Flu Act of 1976, 90 Stat. 1113 (amending 42 U.S.C. § 247(b)), insulating drug companies from products liability claims in order to insure production of the vaccine. *See generally Ducharme* v. *Merrill-National Laboratories,* 547 F.2d 1307 (1978), *cert. denied,* 439 U.S. 1002 (1978). Similar episodes are certain to arise with other drugs.

at a vast rate in the last several years without clear resolution.[3] The costs that will be imposed may be borne in some manner by insurers and manufacturers in the first instance, but in the end they constitute little more than dead weight social losses. The modern revolution in products liability law has shown that it is false and naive to assume that the institution of insurance can handle whatever distribution of risks the courts are prepared to create. *E.g., Thibault* v. *Sears, Roebuck & Co.,* 395 A.2d 843 (N.H. 1978). These dislocations will not be confined to the insurance and pharmaceutical industries, as market share liability is extended to yet other contexts — be it aspirin or aluminum wire — unless it is checked at the outset.[4] The sheer financial magnitude of these cases requires that this Court consider the important legal issues presented now. *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 558 (1963).

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[3] *See, e.g., Insurance Company of North America* v. *Forty-Eight Insulations, Inc.,* 451 F. Supp. 1230 (E.D. Mich. 1978) (proration with insured participation), *appeal pending,* Nos. 78-1322/23/24/25/26 (6th Cir.); *Emons Industries, Inc.* v. *Liberty Mutual Fire Insurance Company,* 481 F. Supp. 1022 (S.D.N.Y. 1979) (proration without insured participation); *American Motorists Insurance Co.* v. *E.R. Squibb & Sons, Inc.,* 406 N.Y.S.2d 658 (Sup.Ct. 1978) (date of first manifestation controls). Both *Emons* and *American Motorists* are DES cases, the first involving a distributor, and the second a manufacturer.

[4] Immediately after *Sindell* was decided, plaintiffs' attorneys in California and other states began filing new suits and amending complaints in suits previously filed, alleging "market share" liability in cases involving other products. The National Law Journal, April 7, 1980, at 3; *Id.,* August 18, 1980, at 1. Commentators have characterized these suits as a "tidal wave" and "tip of an iceberg." J. Henderson, *Products Liability, DES Litigation: The Tidal Wave Approaches Shore,* 3 Corp. L. Rev. 143, 147 (1980); Comment, *DES and a Proposed Theory of Enterprise Liability,* 46 Fordham L. Rev. 963, 1007 (1978).

STATEMENT OF THE CASE

DES, the synthetic estrogen involved in this litigation, was first developed by British medical investigators in 1938. From the outset the formula for the drug was left in the public domain. Three years later, in 1941, a number of American drug manufacturers obtained approval from the Food and Drug Administration ("FDA") to produce DES for a variety of uses unrelated to the prevention of miscarriages in problem pregnancies. In 1947, after further review, FDA approved DES as safe for the prevention of miscarriages as well. Owing to the drug's widespread use and acceptance within the medical profession, FDA removed DES from the list of "new drugs" in 1952. Thereafter, any technically qualified drug manufacturer could produce DES without further testing or having to submit any new data to the FDA. From 1947 to 1971, DES was in wide and continuous use for the treatment of problem pregnancies and was produced by an estimated 200 to 300 national and regional manufacturers.

When in 1971 a correlation was found between the ingestion of DES by pregnant women and the occurrence in their daughters of a rare type of cancer (clear cell adenocarcinoma), FDA banned the drug for use in the prevention of miscarriages (but not for other purposes). It was subsequently established that DES is highly correlated with the appearance of a relatively benign non-cancerous condition, adenosis, which is the basis for most DES suits.

The 10-20 year gap between time of ingestion of DES by mothers and the manifestation of any harmful condition in daughters has made it difficult, and frequently impossible, for a DES daughter to identify the manufacturer of the DES taken by her mother. Because

of the two levels of distribution (distributor and retailer) between the various defendants and the individual plaintiffs, it is virtually impossible for a given defendant to show that its DES has *not* caused the injuries in question. Confronted with this unique situation, the California Supreme Court did not purport to abandon the causation requirement as it applies to product identification. It did, however, adopt a novel and unprecedented theory of proof (nowhere argued for by the plaintiff in her brief) based upon a student comment in the Fordham Law Review, *DES and a Proposed Theory of Enterprise Liability,* 46 Fordham L. Rev. 963 (1978). The stated purpose of the market share rule is to hold each defendant responsible, within rough limits, for that amount of damages that it would be called upon to pay if perfect product identification by source were possible. Appendix A to Petition of Abbott Laboratories ("App.") at A26.

This case therefore involves the procedural due process question of whether, with a causation requirement in place, California can adopt a mode of proof that is utterly inconsistent with its own stated objective. The challenge here is not to the use of presumptions as such. Instead, it is to an *unreasonable* presumption that will embroil the courts, both state and federal, in endless and wasteful litigation.[5]

The applicable portions of the market share rule are as follows:

> . . . we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured

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[5] *See, e.g., Payton* v. *Abbott Labs,* 83 F.R.D. 382 (D. Mass. 1979).

> plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. . . . .
>
> If Plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have make the substance which injured plaintiff is significantly diminished. While 75 to 80 percent of the market is suggested as the requirement by the Fordham Comment (at p. 996), we hold only that a substantial percentage is required.
>
> . . . Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries. . . . Once plaintiff has met her burden of joining the required defendants, they in turn may cross-complain against other DES manufacturers, not joined in the action, which they can allege might have supplied the injury-causing product.

App. A25-A26.

REASONS FOR GRANTING THE WRIT

I. The Market Share Rule Is An Irrational And Arbitrary Means Of Product Identification

The market share rule is subject to the same standards of due process as California legislation. *Chicago, Quincy and Burlington R.R.* v. *Chicago,* 166 U.S. 226, 241 (1897). *See also New York Times* v. *Sullivan,* 376 U.S. 254 (1964). In the first instance, the rule is irrational and arbitrary. Its basic premise is that the mode of proof adopted will not place upon each defendant

burdens above and beyond those that it could be properly made to bear if perfect product identification were in fact possible: "Under this [market share] approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products." App. A26. The rule betrays that premise in three respects:

First, it imposes enormous additional litigation costs on each defendant.

Second, it provides no mechanism to insure that the admitted errors in individual cases will cancel themselves out in the long run.

Third, it establishes a systematic bias against defendants by unfairly requiring them to bear all of the alleged losses caused by other manufacturers not before the court.

Each point requires separate consideration.

A. The market share rule imposes enormous additional litigation costs upon defendants

The California Supreme Court states its market share rule as if only damage awards are to be taken into account. Its view in essence is that defendants are indifferent as to whether they defend 100 percent of ten cases or one percent of each of 1,000 cases. Nothing could be further from the truth. The rule ignores the pervasive impact of transactions costs. It compels defendants with tiny shares to defend themselves on the merits of each DES case. These litigation expenses are deadweight losses from a social point of view, and they are wholly uncompensated losses to the individual defendants. California cannot insist that its rule imposes no addi-

tional liabilities upon defendants when their litigation costs may well exceed any damage payments.

One cause of these added costs is that a unique market must be constructed for each individual case. One market will be appropriate for plaintiffs born in 1950; another for those born in 1951, and so on. The composition of each will vary with the entry and exit of different firms. Likewise, a different geographical market will have to be established for each plaintiff, owing to the different percentages of sales at each particular place at any given time. One market will be applicable for women born in Los Angeles (or some part thereof); quite another for those born in Sacramento; and still another for those born out-of-state.[6] In each geographical market, DES was sold in different dosages, at different prices, for different purposes. All that can be said, when these and other difficulties are multiplied over thousands of plaintiffs and hundreds of defendants — each with multiple insurers — is that California had made an expensive antitrust-type inquiry a prerequisite to a tort action. *Cf. Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 737-38 (1977).

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[6] In the companion California case *(Rogers)*, plaintiff's mother allegedly took DES in Chicago. One of the defendants in *Abel* v. *Eli Lilly & Co.*, 289 N.W. 2d 20 (Mich.App. 1980), distributed DES only in two cities in Michigan. Census figures report that over half the women living in California were born outside of the State. In these cases, the California court would be imposing the market share theory to conduct — and a "market" — having no relationship to California at all. And how is the market to be determined when the mother moved during pregnancy?

B. Under a market share rule the errors in individual cases will not be canceled out in the long run

The California court also insisted that the admitted errors in the individual cases would cancel themselves out in the long run. App. A25. The proposition is simply false. Consider these complications.

1. Many potential defendants will be regional manufacturers who will not be amenable to jurisdiction in California. *World-Wide Volkswagen Corp.* v. *Woodson,* _____ U.S. _____, 100 S.Ct. 559 (1980). Further, there is no guarantee that other states will adopt California's market share rule. Since these additional parties will not be bound by collateral estoppel, the possibility of third party actions cannot "even out" the losses in the long run. The rule presupposes the existence of third party actions that may not be available at all.

2. Damage awards in cases with identifiable defendants cannot be coordinated with awards under the market share rule. For the rule to have any claim to legitimacy, the manufacturer must be entitled to credit for damages paid in cases where it was identified as the supplier of the product that allegedly caused plaintiff's harm.[7] Without such a credit, then the basic premise of *Sindell* — that over time a manufacturer's overall liabili-

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[7] It is not possible to ignore the problem by assuming that in the long run specific identification will be made on a random basis. In *Abel* v. *Eli Lilly Co.*, 289 N.W.2d 20 (Mich.App. 1980), a large portion of the identified claims were against one manufacturer who supplied the particular clinic that had treated many of the DES mothers in question.

ty will approximate the liability it would have were it sued individually — is destroyed. Conversely, if a defendant is subjected to market share liability in one suit, followed by an individual judgment in a second suit, there must be some form of retroactive reallocation of the amount paid in the first suit, based upon the amount awarded in the second. How a judgment exonerating defendants in California or a particular defendant in New York, for example, bears upon these computations raises even more insoluble due process questions. Such a reallocation or continuous running recomputation would obviously be objectionable from the standpoint of a given defendant, not to mention the precepts of judicial finality.[8]

3. It is common knowledge that the amounts awarded can vary enormously among juries, even in the same state or the same district. Judicial review of jury awards is not strict and certainly does nothing to eliminate these regional and local variations. The theory of *Sindell* at its best is that each defendant must pay part of an award that he does not owe in order to escape part of an award that he owes to someone else. Yet that theory is rendered sterile when the burdens imposed and the benefits received vary enormously and unpredictably from case to case. No judicial pronouncement is able to make a $100 liability equal to a $10 benefit, or vice versa.[9]

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[8] The procedure resembles the "fluid-class recovery" condemned in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), *aff'd on other grounds*, 417 U.S. 156, 172 n.10 (1974), as "fantastic" and a clear "unconstitutional violation of the requirement of due process of law."

[9] Nor does the problem end here. How are settlements to be accounted for? What consideration is to be given to the fact that some states permit punitive damages and some do not and that some juries may award them while others may not? What happens when each defendant seeks contribution in separate actions against each possible third party?

C. The market share rule contradicts its own stated objective by making defendants who constitute a "substantial" portion of the market pay for all losses causes by all manufacturers

A third defect in the market share rule does not depend upon matters of procedure and evidence, but is inherent in the statement of the rule itself. As articulated, the rule makes a "substantial" portion of the market pay for all losses of all plaintiffs. Where *any* DES manufacturers are not joined as named defendants, the named defendants are necessarily subjected to additional burdens that would not fall upon them if the source of each plaintiff's DES were established. If only 80 percent of the manufacturers by market share are joined in the suit, under *Sindell* they must pay 100 percent of the damages. And so too with 50, or even 20 percent. (This clearly is how the rule is to apply, otherwise there would be no need for third party actions.)

The result is therefore flatly inconsistent with *Sindell's* own premise. If 80% of the DES producers by market share are joined in a suit, only one of two conclusions is *in principle* proper: *Either* 80% of the plaintiffs recover their full tort damages *or* 100% of the plaintiffs recover 80% of their damages — and so with the other cases. The one wholly impermissible result is the one adopted in *Sindell.* To allow all plaintiffs full recovery against the named defendants is to a moral certainty to countenance "overpayments" to plaintiffs from these defendants and their insurers — all in violation of the probabilistic foundation of the market share rule itself.

The dangers of the rule cut deeper. Suppose some of the defendants are exonerated on the merits; the remaining defendants must pay for the losses caused by

non-tortious conduct of other parties. Suppose too that some of the defendants prove insolvent; the solvent defendants pay for the wrongs of other manufacturers. Indeed, the market share rule, with joint and several liability, requires a single solvent defendant with one percent of the market to pay for all losses of all plaintiffs.

It will be said that the rule allows suits against third parties. And so it does. But this still does not meet the problem of systematic overpayment by each manufacturer even if the objections discussed above can be overcome. Third party defendants may be innocent or insolvent. But suppose they are not. *Sindell* itself affirms that these defendants are not joint tortfeasors and that they have not engaged in any concerted action. App. A15-A18. It is therefore wholly unexplained why it is incumbent upon each defendant to sue third parties instead of leaving that task to the plaintiff. Consistent with the requirements of procedural due process, a plaintiff should not be able to recover a judgment from D-1 for harms solely caused by D-2, by assigning to D-1 plaintiff's cause of action against D-2. This violation of due process is not mitigated by casting the principle into probabilistic form. If D-1 has only a 10 percent probability of having harmed the plaintiff, then it is a denial of fair procedures to hold him for 100 percent of the loss. It makes no difference if D-1 is given in exchange an action over for 90 percent of his loss against defendants D-2 through D-300.

There is apt precedent for this point of view. In *Rees* v. *City of Watertown*, 86 U.S. 107 (1873), holders of municipal bonds in default sought to impose liability upon the citizens of the municipality that issued the bonds. This Court refused to allow the suit because it

would permit the plaintiffs to hold a single citizen responsible for the *entire loss* of the community, when in truth he was bound as a taxpayer only to pay his proportionate share. 86 U.S. at 119-20. This is the precise effect of the rule in this case. By using the market share rule, the plaintiff is permitted to hold each defendant liable not merely for its proportionate share, but for the full loss in question.

The only rational and fair way that can even begin to meet these defects is to hold each defendant only for its proportionate market share — the plaintiff taking the risk of the insolvency or immunity from suit of the manufacturers not joined in the original case. But this "solution" points out the utter poverty of the *Sindell* rule itself. As each defendant now responds only for its own share, there is no reason why any two or more manufacturers would have to be joined in order to have a "substantial" share of the market before the court. In principle, a plaintiff could sue a defendant with a one percent share of the market for one percent of her losses.

This procedure would at least remove from defendants indemnity costs that they should not in principle bear, and it would eliminate the endless suits for indemnity and contributions that will otherwise arise. Nonetheless, it fails to respond to all the constitutional objections to the market share rule. Drug manufacturers will still bear the enormous costs of defending all DES actions whenever the particular supplier is not identified; they will still be put to the task of defining market shares; and there still will be every likelihood that admitted individual errors will not cancel each other out in the long run. Whether these defects are enough to condemn this rule of proportionate shares is not before this

Court, for the rule itself has not been adopted by California. Yet a discussion of its strengths and weaknesses only confirms the previous conclusion that the market share rule as announced in *Sindell* creates such an arbitrary and burdensome presumption that it cannot withstand scrutiny under the Due Process Clause.

II. The Market Share Rule Imposes Arbitrary And Unmanageable Burdens Upon The Defendants And The Courts

At a minimum, due process demands that a party have an opportunity to defend himself on the merits against any charges made against him. This opportunity must be afforded in an atmosphere that makes possible an orderly resolution of all relevant substantive matters. In short, the issue of unmanageability rises in itself to a constitutional level. For example, class action notice requirements have been found on occasion to be so onerous and complex that their employment would constitute a violation of procedural due process. *See, e.g., Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1013 n.13 (2d Cir. 1973). Likewise, the complexity of predatory pricing suits has raised the question of whether the right to jury trial, itself guaranteed by the Constitution, is overriden by requirements of procedural due process. As the Third Circuit recently noted, there are basic due process objections "[i]f judicial decisions are not based upon factual determinations bearing some reliable degree of accuracy." *In re Japanese Electronic Products Antitrust Litigation,* 1980-2 Trade Cas. ¶ 63,421 (3d Cir., July 7, 1980).

It might be argued that consolidation of common issues will be possible. The fact remains that no such coordination will be possible on the vast majority of issues. It is frightening but true that this litigation will transcend the limits of the judicial system. It may well be possible for other systems of compensation to handle the DES cases. That issue, however, is simply not presented here; nor is it precluded by any decision which reverses the decision below. No courtroom is large enough to contain the battalion of lawyers whose services will be needed if the *Sindell* decision is permitted to remain law.

III. The Court Should Determine Whether The Market Share Rule Conflicts With The National Policies Embodied In The Federal Regulation Of Drugs

The national policy is to foster the availability to the public of low cost generic or "me-too" drugs. Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301 *et seq; Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 138 (1967). Accordingly, FDA has promulgated regulations to encourage the sale of "identical, related, or similar drugs." 21 C.F.R. §306.1(b) (1979).

The market share theory adopted by the California court directly conflicts with this policy. It imposes liability upon the large numbers of manufacturers that sold DES after FDA sanctioned it as safe for use in preventing miscarriages. *United States* v. *Rutherford,* 442 U.S. 544, 552 n.8 (1979); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609, 612-13 (1973).

The California court was aware of the conflict between national drug policy and state tort law. Indeed, it

rejected the plaintiff's "concerted action" theory in part because that theory gives insufficient recognition to the "pervasive role" of the federal government in the "testing and marketing of DES." App. A23. Yet nowhere does the court explain why that pervasive federal role is not undercut by adoption of the market share rule. Like the concerted action theory, the market share rule exposes all defendants to losses caused by other defendants; it is more onerous because it does so without the necessity of proving any agreement, express or implied, among the parties. The necessary conflict between federal drug policy and state tort law is in truth greater with the "market share" rule.

In *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959), this Court held that a state law rule of defamation as applied to broadcasters was in conflict with the requirements of the Federal Communications Act. The market share liability imposed in this case stands just as much "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in the drug area. *Id.* at 535. The holding in *Sindell* "would either frustrate the underlying purposes" for which the generic drug provisions of federal law were enacted or alternatively impose "unreasonable burdens on the parties governed by that legislation." *Id.*

As the dissent in *Sindell* and an intermediate California court emphasized, the imposition of liability in these cases is wholly inconsistent with federal policy. App. A34-A35; *McCreery* v. *Eli Lilly & Co.*, 87 Cal.App. 3d 77, 86, 150 Cal.Rptr. 730, 736 (1978). Congress has entrusted the administration of national drug policy — and its purpose of fostering the public's interest in "drugs that are useful in the prevention, control, or treatment of illness," *Weinberger* v. *Hynson,*

Westcott & Dunning, Inc., 412 U.S. 609, 639 n.2 (1973) (Powell, J., concurring) — to a centralized federal agency, the FDA. "Congress has chosen the FDA to be the decision maker in this area, and its judgments in approving a drug as safe for use must be beyond private scrutiny and litigation." *Gray* v. *United States,* 445 F. Supp. 337, 340 (S.D.Tex. 1978). The market share rule frustrates this policy.

CONCLUSION

The market share rule represents a serious threat to the system of judicial administration in the United States and to the national policies embodied in the federal regulation of drugs. The Due Process Clause protects litigants and the integrity of the judicial process from the artificial, unreliable and unworkable presumptions and the awesomely complex litigation that the market share rule must inevitably spawn. Federal drug legislation and regulation protect the distribution of drugs from the unwarranted intrusions of a state tort system.

The petitions for a writ of certiorari should be granted to vindicate both of these vital interests.

RICHARD A. WHITING
LOREN KIEVE
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000
(Counsel of Record)

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, Illinois 60637

Attorneys for Amicus Curiae
The American Insurance
Association

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